APPENDIX.

Pertinent Statutes.

Section 77(a) of the Bankruptcy Act (11 U. S. C. 205a):

"(a) * * * the court (*i. e.*, bankruptcy court) * * * shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. * * *"

Section 77 (c-7) of the Bankruptcy Act (11 U. S. C. 205 c-7):

"(c-7) The judge shall promptly determine and fix * * * the manner in which such claims (*i. e.*, claims of creditors) may be filed or evidenced and allowed * * *"

Section 77(j) of the Bankruptcy Act (11 U. S. C. 205j):

"(j) In addition to the provisions of section 11 of this Act (§ 29 of this title) for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated."

Section 77(L) of the Bankruptcy Act (11 U. S. C. 205L):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons

with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 62(a) of the Bankruptcy Act (11 U. S. C. 102a):

"The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

Section 66 of the Judicial Code (28 U. S. C. 125):

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Section 24 of the Bankruptcy Act (11 U. S. C. 47):

"Jurisdiction of appellate courts.—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided, further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 6(b) of the Chandler Act, effective September 22, 1938 (Note, 11 U. S. C. 1):

"Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect."

(2)

FILED
SEP 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 333

IN THE MATTER OF
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, a Corporation,
Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a Corporation (Substituted for Benjamin Wham, Trustee)
Petitioner,

vs.

ARTHUR F. GOURLEY,
Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI.

JOSEPH D. RYAN,
Attorney for Respondent.

CHAMPLIN-SHEALY COMPANY, CHICAGO

INDEX.

	PAGE
Reply to Petition for Writ	1
A. Summary Statement of the Matter Involved	1
C. Questions Presented	5
D. Reasons for Allowance of the Writ	6
Brief	6
Summary of Argument	7
Argument	9
I. The State Court Judgment is Final and Conclusive as a liquidation of a tort claim arising out of the operation of a train; this Judgment is binding on the Bankruptcy Court	9
A. The proviso to Section 77j applies to all tort claims arising out of the operation of trains, whether occurring prior to adjudication or afterward, and whether administrative or otherwise	9
B. The plain language of the proviso to Section 77j is controlling as to the method and manner of allowance of such claims as are therein dealt with	11
C. The general language of Section 77a, insofar as it touches on claims for transportation torts, must yield to the express provisions of Section 77j for the liquidation of such claims	12
D. The debtor in possession occupies a position analogous to an equity receiver. Our position, however, is not based on this theory, but is grounded on the provisions of Section 77j	13
II. The District Court's Order is Appealable	13
A. The Chandler Act has abolished the distinction between "controversies" and "proceedings"	13
B. This is a "proceeding"	15

C. Since this is a "proceeding", an inquiry as to whether certain orders in "controversies" are appealable is futile 16

D. The District Court order was final, in so far as it attempted to nullify the state court judgment 16

E. The order is final, or, at the most, final in part and interlocutory in part. There is no third classification 17

TABLE OF AUTHORITIES.

Cases:

Anderson v. Scandrett, 19 Fed. Supp. 681, 683..... 11
Avorn Dress Co., In re, 78 Fed. (2) 681, 683.....10, 13
Breyer Printing Co., In re, 216 Fed. 878, 880.....15, 16
Chicago T. & T. Co. v. Fox Theatres Corp., 69 Fed. (2) 60 .....10, 11
Coder v. Arts, 213 U. S. 223, 234, 235..... 15
Dickinson Industrial Site v. Cowan, 309 U. S. 382, 387.13, 14
James Butler Grocery Co., In re, 12 Fed. Sup. 851, 853, 854 .....10, 13
Jayrose Millinery Co., In re, 93 Fed. (2) 471..... 15
Layne, etc., Co. v. Western Well Works, 261 U. S. 387, 393 14
Lovejoy v. Murray, 3 Wall 1, 18, 19..... 13
Richmond v. Atwood, 52 Fed. 10, 20-22..... 16
Riehle v. Margolies, 279 U. S. 218.....10, 11
Souffront v. Compagnie Des Sucreries, 217 U. S. 475, 487 13
Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 118.... 15
Torgovnick, In re, 49 Fed. (2) 211, 212..... 15
Winton Shirt Corp., In re, 104 Fed. (2) 777..... 14

Statutes:

Section 77 of the Bankruptcy Act.....5, 6, 13
Section 77-a of the Bankruptcy Act.....7, 12
Section 77-c-7 of the Bankruptcy Act..... 10

Section 77j of the Bankruptcy Act.....5, 7, 9, 10, 11, 12, 13
Section 66 of the Judicial Code..... 13
Section 62a of the Bankruptcy Act..... 10

Texts:

Collier on Bankruptcy, 14th Ed. Vo. 2, p. 739, Sec. 24.15 15
Gerdes on Corporate Reorganizations, Sec. 454, 922... 12
2 R. C. L. 40..... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 333

IN THE MATTER OF

CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, a Corporation,

Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a Corporation (Substituted for Benjamin Wham, Trustee)

Petitioner,

vs.

ARTHUR F. GOURLEY,

Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

At the risk of repetition we will state the pertinent facts briefly.

Claimant was injured on August 3, 1933, in an accident caused by the operation of a train. This train was operated by the debtor corporation, continued in possession by order of the court, no trustee having been appointed.

In due course a trustee was appointed, who took charge of the railroad. Claimant subsequently brought suit in a state court to recover for his injuries, demanding a jury trial. This suit was brought against the trustee.

The trustee appeared in the state court suit and defended on the ground, among other things, that he was not in possession or control of the railroad at the time of the accident (R. 27). Neither in this answer nor in any subsequent pleading did the trustee assert that the suit could not be maintained because the District Court had not authorized liquidation in this manner, or that the state court lacked jurisdiction. These defenses were urged only in the federal courts, and at a much later date.

Taking the trustee's plea of non-operation and control at its face value, claimant filed an additional count against the debtor corporation, setting up the same cause of action, but impleading the corporation as an additional defendant. A summons was issued against the new defendant on the additional count, and service was had on an attorney formerly in the legal department of the debtor, but at the time of service in the employ of the trustee (R. 12). The trustee caused an answer to be filed in behalf of the debtor corporation, tendering issue on the merits, and thereby and thereafter chose to defend the suit through the medium of the debtor. He remained in charge and control of the litigation throughout its entire course, and the expenses of the defense were paid by the estate, under the general order of the District Court (R. 130, 131).

After the answer to the additional count was filed, the trustee made a motion to be dismissed from the case, on the ground that the tort was committed prior to his appointment, and he was not liable for torts committed at that time (R. 65); to this motion was attached an affidavit in which the trustee averred that "there was no person or persons appointed or acting as Trustee of said estate" at the time of the accident (R. 66). No order was entered on this motion (R. 16). All the pleadings up to this point bore the names of both defendants in the title.

Some time later an amended complaint was filed, charging negligence against the debtor only. No order dismissing the trustee was ever entered.

The case went to trial, and the jury returned a verdict for claimant in the amount of $80,000 (R. 34, 35). This verdict was set aside by the trial court for alleged error of law (on grounds with which we are not concerned), and judgment was rendered for the defendant notwithstanding the verdict (R. 37).

Claimant appealed to the Illinois Appellate Court, which reversed the judgment of the trial court and remanded the case, with directions to enter a judgment in claimant's favor for $60,000, after requiring a remittitur of $20,000 to cure an alleged excessiveness in the verdict (Claimant's Ex. 6, R. 34, *et seq.*).

The Illinois Supreme Court denied leave to appeal, thus making the judgment final (R. 34).

The expenses of defending the case were paid by the trustee under the general order of court, as an administrative expense (R. 13).

Claimant then presented his judgment to the District Court, whereupon it was referred to a master for consid-

eration. It was agreed between the master and the parties that his report on the legal questions involved, i. e., the validity and effect of the state court judgment, might be made before any other question was taken up (R. 17, 18).

The trustee at first conceded that claimant's state court judgment was a final and binding liquidation of the claim (R. 7). Later, his position was changed, and he asserted non-liability because the judgment was against the corporation, not the trustee (R. 18).

After the master made his report, finding that the state court judgment was not a liquidation of the claim, the matter came on before the District Court, which confirmed the report, holding that (R. 123):

> * * * "The Trustee was not a party to the action in the Superior Court of Cook County and is not estopped to question the judgment of that court. The estate of the debtor has never had a hearing and is entitled to one."

C.

QUESTIONS PRESENTED.

We submit that there are only two questions of any importance presented here. They are as follows:

1. Is a claim for personal injuries incurred in a train accident, at a date subsequent to the filing of a petition under Section 77 of the Bankruptcy Act, suable in a state court by virtue of the proviso to Section 77j of that Act?

2. After a trustee has resisted a personal injury claim against the debtor's estate, arising out of a transportation accident, has participated in a jury trial, has followed and controlled the litigation through two courts of appeal, has paid the expenses of litigation and had such payment approved, and has finally lost his case, may he insist in the District Court, for the first time, that the judgment was against the debtor and not against the trustee, and that the merits of the claim should be relitigated?

D.

REASONS FOR ALLOWANCE OF THE WRIT.

1. There is no showing that adherence to the decision of the Court of Appeals will greatly or at all impede the reorganization of railroads under Section 77, or handicap the bankruptcy courts in disposal of such proceedings. The instant case has not impeded the reorganization of the railroad involved, since a final decree has been entered (R. 141, 142). How liquidation of a tort claim by jury trial in a state court could possibly handicap a bankruptcy court in disposal of reorganization proceedings is not made plain at all. On the contrary, by transferring to other courts the exacting task of liquidating personal injury claims, the bankruptcy courts are relieved of an onerous burden. The fact that claims which may be liquidated by jury trials include property damage as well as personal injury claims is a distinction without significance. The argument that all creditors may not be advised as to how claims are being liquidated is fallacious, since the trustee defends in behalf of the creditors as well as of himself, and so represents the creditors in jury trials.

2. The fancied conflict between the decisions of the Third and Seventh Circuits as to whether the Chandler Act has abolished all distinctions between "proceedings" and "controversies" is moot in this case, since both circuits are in agreement that an appeal lies from interlocutory orders in "proceedings," and it is clear that the present appeal is a "proceeding."

SUMMARY OF ARGUMENT.

I.

THE STATE COURT JUDGMENT IS FINAL AND CONCLUSIVE AS A LIQUIDATION OF A TORT CLAIM ARISING OUT OF THE OPERATION OF A TRAIN; THIS JUDGMENT IS BINDING ON THE BANKRUPTCY COURT.

A. The proviso to Section 77j applies to all tort claims arising out of the operation of trains, whether occurring prior to adjudication or afterward, and whether administrative or otherwise.

B. The plain language of the proviso to Section 77j is controlling as to the method and manner of allowance of such claims as are therein dealt with.

C. The general language of Section 77a, insofar as it touches on claims for transportation torts, must yield to the express provisions of Section 77j for the liquidation of such claims.

D. The debtor in possession occupies a position analogous to an equity receiver. Our position, however, is not based on this theory, but is grounded on the provisions of Section 77j.

II.

THE DISTRICT COURT'S ORDER IS APPEALABLE.

A. The Chandler Act has abolished the distinction between "controversies" and "proceedings."

B. This is a "proceeding."

C. Since this is a "proceeding," an inquiry as to whether certain orders in "controversies" are appealable is futile.

D. The District Court order was final, in so far as it attempted to nullify the state court judgment.

E. The order is final, or, at the most, final in part and interlocutory in part. There is no third classification.

ARGUMENT.

I.

THE STATE COURT JUDGMENT IS FINAL AND CONCLUSIVE AS A LIQUIDATION OF A TORT CLAIM ARISING OUT OF THE OPERATION OF A TRAIN; THIS JUDGMENT IS BINDING ON THE BANKRUPTCY COURT.

A. The proviso to Section 77j applies to all tort claims arising out of the operation of trains, whether occurring prior to adjudication or afterward, and whether administrative or otherwise.

Section 77j is not limited to "suits against the debtor," as petitioner supposes. True, in the first clause it deals with this subject. The second clause, manifestly independent of the first, since touching a totally unrelated subject matter, refers to proceedings to enforce liens "upon the estate," not "against the debtor." The third clause has to do with another entirely different subject, viz., suits or claims for damages arising out of transportation accidents, and creates an entirely new remedy for this class of claims. This clause is not dependent upon either of the two preceding clauses. Obviously it cannot be construed to modify the clause immediately preceding it, which deals with liens. What basis is there for assuming that this clause, independent in form and complete in itself, modifies or limits the most remote clause in the paragraph?

There is no qualification whatever in this proviso. It is not limited to suits against the debtor. It is not restricted in point of time. Had Congress wished to differentiate between claims arising before and after the petition, it would

have been a very simple matter so to provide in the act. This Congress failed to do. We can perceive no reason why the court should do it.

It is obvious that by this proviso Congress intended to confer on tort claimants the same rights to bring suit which they enjoyed in cases arising under equity receiverships. The trustee is a receiver or a manager within the meaning of Section 66 of the Judicial Code. (*In re Avorn Dress Co.*, 78 Fed. (2) 681, 683; *In re James Butler Grocery Co.*, 12 Fed. Supp. 851, 853, 854.) Clearly, it was the intention of Congress that the trustee could be sued in the same manner and to the same extent that an equity receiver or manager might be sued. (*Riehle* v. *Margolies*, 279 U. S. 218; *Chicago T. & T. Co.* v. *Fox Theatres Corp.*, 69 Fed. (2) 60.)

Section 77c-7 provides that the judge shall determine and fix the manner in which claims of creditors may be evidenced and allowed. Section 62a of the Bankruptcy Act provides that the expenses of administration shall be approved or disapproved by the court. Petitioner takes the position that Section 77j, permitting suits on transportation torts to be brought in the state courts, overrules Section 77c-7 where general claims are concerned, but must yield to Section 62a where administrative expenses are concerned. No adequate reason is suggested for the distinction, and we submit that the proviso to Section 77j is controlling in all cases of transportation claims, whether occurring before or after adjudication, and hence, whether general or administrative in their nature.

In its carefully reasoned opinion, analyzing the proviso from the standpoint of sentence structure as well as discussing the question of legislative intent as shown by the statute as a whole, the Circuit Court of Appeals demonstrates that the proviso to Section 77j is controlling here (R. 133-136).

B. The plain language of the proviso to Section 77j is controlling as to the method and manner of allowance of such claims as are therein dealt with.

In *Riehle* v. *Margolies*, 279 U. S. 218, this court held that suits against an equity receivership, prior to the appointment of a receiver, might be prosecuted to judgment in state courts. The court reserved the question of whether the same rule would be applicable to an action commenced after appointment of the receiver. In *Chicago T. & T. Co.* v. *Fox Theatres Corp.*, 69 Fed. (2) 60, the court held that the rule should be extended to such actions.

Section 77j does not provide, as claimed by petitioner (brief, p. 15), that "if authorization and consent be sought in cases arising out of the operation of trains, etc., authorization and consent will be given." The section provides that such claims may be prosecuted to judgment in any court of competent jurisdiction, and any order staying the prosecution of such suits shall be vacated. In a further provision it holds such orders null and void. Nothing in the language employed in 77j or in any other section can be tortured into a requirement that consent to sue be obtained, an obviously useless act, since consent cannot be withheld, and an order withholding it is a nullity. See *Anderson* v. *Scandrett*, 19 Fed. Supp. 681, 683. Nor need creditors be apprised of the state court suit. They would have no right to enter into or contest the proceedings; they are represented by the trustee, who acts in behalf of all, under the direction and control of the bankruptcy court.

C. The general language of Section 77a, insofar as it touches on claims for transportation torts, must yield to the express provisions of Section 77j for the liquidation of such claims.

Although Section 77a provides that the bankruptcy court shall have exclusive jurisdiction over the debtor, Section 77j permits suits on transportation claims to be brought in state courts. This grant of jurisdiction must be held to modify the otherwise exclusive jurisdiction of the bankruptcy court; or else 77j is meaningless.

Such an interpretation would deprive persons injured in transportation accidents of the right to a trial by jury, a right expressly and specifically granted by Congress. Their remedy conferred by 77j would be revoked by 77a. The clear intent of Congress to permit jury trials in this class of cases would be ignored.

It is by no means clear that the "naked debtor corporation" was not the proper and only defendant in the state court suit. It was operating the road when the accident occurred, and claimant was injured through the negligence of its servant. It is a railroad corporation, not a trust company; it is not capable of acting as trustee. (Gerdes on Corporate Reorganizations, Sec. 454, 922.) To sue it as "agent of the court" would lend no additional validity to the proceedings.

The trustee was obligated to defend the suit; this he chose to do through the medium of the debtor corporation. His actions were ratified by the District Court when his expenses in defense were approved as an expense of administration. The estate of the debtor was the fund ultimately liable for payment of the claim, whether it was brought into court in its own capacity, or by its trustee. One who defends a suit in the name of another, to defend

his own right, is bound by the judgment rendered, and is estopped from claiming the judgment was taken against the wrong party. (*Souffront* v. *Compagnie Des Sucreries*, 217 U. S. 475, 487; *Lovejoy* v. *Murray*, 3 Wall 1, 18, 19.)

D. The debtor in possession occupies a position analogous to that of an equity receiver. Our position, however, is not based on this theory, but is grounded on the provisions of Section 77j.

Our position is not dependent for its validity upon the applicability of Section 66 of the Judicial Code to proceedings under Section 77 of the Bankruptcy Act, although Section 66 has been held applicable in *In re Avorn Dress Co.*, 78 Fed. (2) 681, 683, and *In re James Butler Grocery Co.*, 12 Fed. Supp. 851, 853, 854. Our right to sue is derived from Section 77j of the Bankruptcy Act, where it is conferred in express terms.

II.

THE DISTRICT COURT'S ORDER IS APPEALABLE.

A. The Chandler Act has abolished the distinction between "controversies" and "proceedings."

The intent of the Chandler Act was to do away with the technicalities which had grown in the practice, and to simplify the procedure as far as practicable. No explanation is given by petitioner for the retention of the old, outmoded and shadowy distinction between proceedings and controversies; no reason is mentioned why the difference should be abolished in all other respects, but retained in the method of taking appeals. A fair interpretation of the act is that the distinction is abolished.

This court, in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 387, remarked that Congress intended to eliminate

all the old distinctions between controversies and proceedings. The court quoted the Senate Committee Report to the effect that, "appeals may be made as of right in all cases involving $500.00 or more." The court then noted one exception to this rule, viz., appeals on fee allowances, and that exception was based on Sec. 250, and not on Sec. 24. The Circuit Court of Appeals in the present case followed the *Dickinson* case strictly.

In re Winton Shirt Corporation, 104 Fed. (2) 777 (C. C. A. 3), was concerned with whether an appeal could be taken as a matter of right from an order of the District Court, or whether leave of the reviewing court was necessary. The court dealt with the proviso to the Act, requiring leave to appeal to be granted where less than $500.00 was involved; and the particular question decided was whether when no definite sum of money was involved, the $500.00 limitation required appellant to obtain leave to appeal.

While the court stated that "it appears that appeals in controversies may be taken only from final orders, decrees or judgments" (p. 779), this language was not necessary to the decision of the case, was dictum pure and simple, and this court should not deem it necessary to take jurisdiction of the present case in order to correct *obiter dictum* in a case long disposed of.

This court announced, in *Layne Co.* v. *Western Well Works,* 261 U. S. 387, 393, that even though certiorari were granted to resolve a supposed conflict between circuits, it would be dismissed if examination failed to disclose "a real and embarrassing conflict of opinion and authority" (p. 393).

There is, in reality, no conflict between circuits.

B. This is a "proceeding."

Even were the old distinction between "controversies" and "proceedings" still of any practical value, our situation is unchanged. This is a "proceeding," not a "controversy."

In *Coder* v. *Arts*, 213 U. S. 223, where a mortgagee of the bankrupt filed a claim, but did not waive his security, the court distinguished cases in which the claimant asserted title to the property of the bankrupt, and held the mortgagee's claim a "proceeding" (pp. 234, 235).

The foregoing case was cited and followed in *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118.

In re Jayrose Millinery Co., 93 Fed. (2) 471, concerned a claim for sales taxes in which priority was asserted. This was held a "proceeding," following the *Coder* case, 213 U. S. 223, *supra*.

This is an expense of administration. Questions arising out of such expenses are "proceedings." See Collier on Bankruptcy, 14th Ed., Vol. 2, p. 739, Sec. 24.15.

In re Torgovnick, 49 Fed. (2) 211 (C. C. A. 2), cited by petitioner, it is held that (p. 212):

> "* * * 'controversies' are those matters which arise between the estate as a whole and persons who have legal relations with it other than as creditors."

In the instant case, claimant is a creditor of the estate, therefore, by petitioner's own definition, *supra*, this is not a "controversy."

From the other case cited by petitioner, *In re Breyer Printing Co.*, 216 Fed. 878, we learn (p. 880):

> "'Proceedings in bankruptcy' cover * * * allowance and disallowance of claims * * *. Controversies * * * involve questions between the receiver or trus-

> tee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the receiver or trustee or of the claimants."

The instant case does not concern property in the possession of the trustee, or seek to impose any lien upon or claim of title to property of any kind whatever. Clearly, according to the cases cited, this is a "proceeding."

The decision in our case is in no sense in conflict with the two cases last cited.

Since this is a "proceeding," and not a "controversy," it matters not whether the order appealed from is final or interlocutory.

C. Since this is a "proceeding," an inquiry as to whether certain orders in "controversies" are appealable is futile.

We have shown under the preceding headings that this is a "proceeding." This being true, it is unnecessary to take the time to pursue an academic inquiry into whether interlocutory orders in "controversies" are appealable. This question is entirely foreign to the matter in hand.

D. The District Court order was final, in so far as it attempted to nullify the state court judgment.

At the suggestion of the special master, all parties agreed that a report should be made on the single question of whether the state court judgment was final (R. 18). In view of this agreement, petitioner should not now be heard to say that the report and the decree confirming it are not final, as to all questions embraced therein. The action of the court in nullifying the effect of the state court judgment is final (2 R. C. L. 40).

E. The order is final, or, at the most, final in part and interlocutory in part. There is no third classification.

As we have shown, that part of the order which nullified the state court judgment was final; the remainder was interlocutory. Decrees in equity are either interlocutory or final; there is no third classification (*Richmond* v. *Atwood*, 52 Fed. 10, 20-22).

Since this is a "proceeding," it is immaterial whether the decree was interlocutory or final; it was appealable in either event.

CONCLUSION.

No ground exists for issuance of the writ of certiorari in this case, and we respectfully submit that the Petition should be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Arthur F. Gourley, Respondent.